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THE PROMOTION OF SOCIAL RIGHTS AND LABOUR STANDARDS IN EU EXTERNAL TRADE RELATIONS

Samantha Velluti

1. SETTING THE CONTEXT AND FOCUS OF ANALYSIS

At European Union (EU) level there has been a growing realisation that trade and international economic law can have a significant impact on much more than economic activity and that they can raise profound questions of social concern. As a consequence, the EU has increasingly been employing a social conditionality approach, which aims at securing compliance with specified international labour standards. The methods used as conditionality are made up of two elements: a punitive method, i.e. the “stick”, in order to punish proven breaches of human rights standards with the elimination of trade preference, by imposing trade sanctions against third countries that do not observe them (negative conditionality) and an incentive method, i.e. the “carrot”, that provides for additional preferential treatment through reduced tariffs and market access, to reward achievements in respecting and promoting human rights and social and environmental standards (positive conditionality).

The focus of analysis of the paper is on the EU’s increased practice of promoting social rights and international labour standards in its external trade relations, unilaterally through the Generalised System of Preferences (GSP; and largely under its incentive scheme, namely the GSP+), and at regional and bilateral levels via international agreements, which encompass reciprocal or non-reciprocal preferential trade links with third countries. Many EU trade agreements include social incentive clauses and condition trade concessions and market access on the respect and implementation of internationally recognized human rights and social and environmental standards. In this context the paper intends to unpack the tensions in the discourse and practice of the EU’s promotion of social rights in its external trade relations.

EU social trade has received much praise and much criticism. The European Commission has claimed that it provides the greatest possible contribution to strengthening the social dimension of development cooperation.¹ In a similar vein, some have argued that there is evidence showing an improvement in labour rights in the signatory countries of EU preferential trade agreements, which is exhibited *ex post* as a result of learning by civil society actors during the implementation phase of labour provisions.² At the other end of the spectrum, it

¹ European Commission – ILO, Memorandum of Understanding concerning the establishment of a strategic partnership between the International Labour Organisation and the Commission of the European Communities in the field of Development, 17 July 2004, Brussels and 16 July 2004, Geneva, available at <https://ec.europa.eu/europeaid/sites/devco/files/memorandum-of-understanding-ec-ilo-2004_en.pdf>.

² E. Postnikov and I. Bastiaens, ‘Does dialogue work? The effectiveness of labor standards in EU preferential trade agreements’ 21 *Journal of European Public Policy* 2014, 923-940.

has been argued that the GSP programme has allowed the EU to provide significant trade benefits to countries that have abhorrent human and labour rights records³ and that the GSP+ scheme and its conditionality has not yet resulted in significant changes in the situation “on the ground” in beneficiary countries.⁴

The above diverse if not opposing views about EU social conditionality immediately present us with the controversy surrounding the trade-labour linkage and a certain degree of scepticism in relation to the effectiveness of any policy, agreement, measure or arrangement aimed at linking non-commercial objectives to trade. It also brings to light issues of legitimacy and credibility of EU external action particularly in relation to the EU’s normative mission as a global human rights actor, which has been reinforced by the 2009 Treaty of Lisbon. Despite the major changes introduced by this Treaty in relation to the constitutional design of EU external relations,⁵ particularly in relation to the EU external commercial competence,⁶ the EU’s authority to act on external matters of trade and labour is all but clear. Even though the scope of the EU’s Common Commercial Policy (CCP) has been interpreted broadly by the EU Court of Justice (CJEU),⁷ labour issues in trade agreements are not part of the EU’s exclusive competence and remain within Member States’ competence giving rise to the phenomenon of mixed agreements.⁸

Equally problematic is another key change of the Treaty of Lisbon, namely, the injection of a normative approach into EU external relations via Article 3(5) and 21 TEU. Here, issues of consistency and coherence in the EU external action inevitably remain, which are explained to a great extent by the extant complexity of the EU’s external relations framework originating in the duality between its Common Foreign and Security Policy (CFSP) and the non-CFSP competences and

³ J. Vogt, ‘A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalised System of Preferences (GSP)’ 31 *International Journal of Comparative Labour Law and Industrial Relations* 2015, 285-304.

⁴ CARIS, ‘Mid-term Evaluation of the EU’s Generalised System of Preferences’, Report commissioned by the EC, Brighton: Centre for the Analysis of Regional Integration at Sussex, University of Sussex, 2010, available at <<http://www.sussex.ac.uk/caris/projects>>. The final report is available at: <http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146196.pdf>.

⁵ T. Ramopoulos and J. Wouters, ‘Charting the Legal Landscape of EU External Relations Post-Lisbon’ Leuven Centre for Global Governance Studies Working Paper N. 156 – March 2015, available at <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp156-ramopoulos-wouters.pdf>.

⁶ E.g. Articles 3(1)e TFEU, 206, 207 and 218 TFEU; see further, G. Villalta Puig and B. Al-Haddab ‘The Common Commercial Policy after Lisbon: An Analysis of Reforms’ 36 *ELRev* 2011, 289 and M. Bungenberg and C. Hermann (eds) ‘Common Commercial Policy after Lisbon’, *European Yearbook of International Economic Law/Special Issue* (Heidelberg: Springer 2013).

⁷ P. Koutrakos, *EU International Relations Law* (Oxford: Hart 2015), Chs. 2-3.

⁸ C. Hillion, P. Koutrakos (eds) *Mixed Agreements Revisited - The EU and its Member States in the World* (Oxford: Hart 2010); C. Timmermans ‘The Court of Justice and Mixed Agreements’ in A. Rosas, E. Levits and Y. Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (The Hague: TMC Asser Press 2013), 659-674.

maintained by the Treaty of Lisbon.⁹ The uneven balance between “high” and “low” politics of EU external actions¹⁰ still justifies the selection of two different sets of substantive policy-making and implementation procedures to cover “political” and “economic” aspects of EU external action, in spite of the single procedure envisaged in Article 218 TFEU for the adoption of international agreements. This unclear EU external relations framework has been made most visible by a series of inter-institutional disputes in the field of external representation and conclusion of international agreements.¹¹

When it comes to issues that go beyond trade, as most international agreements of the EU do, potential conflicts are not limited to the content of the agreements but also extend to the very objectives pursued by these agreements. To put it shortly, is linking trade to labour a way of protecting domestic industries or promoting EU values? In this context other questions arise concerning the way the EU furthers the trade-labour linkage and, chiefly, what are the reasons for the EU’s reluctance to include a legally enforceable social clause in trade agreements?¹²

The paper takes as a starting point the fact that while the EU portrays itself externally as speaking with a “single voice” to its trade partners, internally the lack of a clear division of competences shows that it operates as a “pluralistic entity” through a pooling of international representation of various internal actors. As a “conflicted trade power”¹³ the EU cannot always exert real influence externally particularly when the trading partner is a powerful global economic or geopolitical player. Linked to this, EU external trade policy is highly driven,

⁹ Article 24(1) second paragraph TEU which stipulates that the CFSP ‘is subject to specific rules and procedures’.

¹⁰ The term “high” politics refers to foreign policy *sensu stricto* and it concerns international or national security; “low” politics refers to policies and measures which are not essential to world or national security, such as economic or social policies and development aid.

¹¹ P. Van Elsuwege, “The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty” in M. Cremona and A. Thies (Eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart, 2014), pp. 123–24. The *Mauritius* case (Case C-658/11 *European Parliament v Council* ECLI: EU:C:2014:2025) concerning the action for annulment by the European Parliament against a Council Decision on the signing and conclusion of an agreement with Mauritius on the conditions of transfer of suspected pirates and associated seized property from the EU-led naval force to Mauritius, and their treatment subsequent to their transfer (Council Decision 2011/640/CFSP [2011] OJ L 254/1, 30.9.2011), shows that the CFSP is no longer isolated from the rest of the EU legal order, even though no control of substance is possible other than that envisaged in Article 275(2) TFEU in connection with Article 40 TEU (the so-called “mutual non-affectation clause”) and Article 215 TFEU (concerning restrictive measures against natural or legal persons). In particular, the case shows how Article 218 TFEU provides for a single procedure for negotiating and concluding international agreements, spanning the supranational pillar and the former intergovernmental pillar of the CFSP and Area of Freedom, Security and Justice (AFSJ).

¹² The only exceptions are the GSP scheme and the 2008 EU-CARIFORUM Economic Partnership Agreement (EPA) with Caribbean countries (CARICOM and the Dominican Republic), where a weak form of conditionality is envisaged.

¹³ S. Meunier and K. Nicolaïdis, ‘The European Union as a conflicted trade power’ 13 *Journal of European Public Policy* 2007, 906.

albeit not exclusively, by domestic-societal vested interests with exporters being key drivers of the EU's recent leverage agenda.¹⁴

For the above reasons, EU discourse and practice in relation to social conditionality in trade offer a rather complicated picture. On the one hand, they seem to indicate that the EU utilises the trade-labour linkage as an invaluable development tool. On the other hand, the absence of a uniform and coherent understanding and approach to the trade-labour linkage and the reticence to rely on hard conditionality in certain cases of serious labour violations seems to suggest that the EU utilises the trade-labour linkage instrumentally and in a carefully planned manner as part of broader strategic geo-political, economic and foreign policy objectives. In the latter instance, this reticence seems to demonstrate that the EU is not willing to go beyond the realm of rhetoric.

Against this background, the paper intends to investigate whether a deeper analysis of the EU's social conditionality discourse and practice shows a strong commitment of the EU towards the promotion of social rights and labour standards in its external trade relations that transcends any form of reticence and goes beyond the realm of rhetoric. With the changes introduced by the Treaty of Lisbon social clauses in trade agreements are not mere EU foreign policy instruments but rather mechanisms that the EU should use to comply with its obligations under the EU Treaties, particularly in the light of Articles 3(5) and 21(1) TEU which recognize economic and social rights as a matter of justice that must be extended to external trade relations.

The paper starts by looking at the importance of the EU's role as a global human rights actor within the broader framework of 21st century globalisation. This analysis is important because it helps us to better understand and evaluate the way the EU promotes social rights and labour standards in its external trade relations. The paper then proceeds to examining the main rationales of the trade-labour linkage followed by a critical evaluation of social conditionality in EU external trade relations drawing examples from previous and current EU practice at unilateral, regional and bilateral levels. The conclusion brings together and reflects on the main findings of the paper.

2. THE EU AS A REGIONAL ENTITY WITH A "GLOBAL VOCATION" AND A "SOCIAL AMBITION"

As a supranational order the EU has an important role in the context of new globalisation and transnational forces that dominate the 21st century, which involve a new geography of trade and a trend towards growing multipolarity. As global trends have come to dismantle barriers, bringing about destabilization

¹⁴ For further discussion in the context of domestic politics and how the former shapes different strategies of the EU and the United States (US) towards social standards, see T. Leeg, 'Carrots or Sticks? Social Standards in Preferential Trade Agreements of the EU and the US', paper presented at the Young Researchers' Master Class, European Union in International Affairs (EUIA) Biennial Conference, Brussels, Belgium, 11-13 May 2016.

and imposing changes at domestic level, law inevitably has had to follow suit. This in turn has led to a scenario whereby not only have legal techniques become outmoded and the need for change become conspicuous but, significantly, the aspirations of law and policy have themselves also undergone transformation.¹⁵ Lobel notes that 'in many contexts, the interconnections between the object of regulation (the economy) and the strategy by which it is regulated (law) motivate the push for renewal through the adoption of market practices in the public sphere'.¹⁶ This overarching change has established a link between contemporary problems in the organization of the economy and innovative legal theory on regulation and governance to react to increasing heterogeneity.

The EU may thus provide the forum for the effective systematisation of these new transnational processes by providing non-state actors with a specific role in the policy-making process. In addition, the EU can foster the protection of economic and social rights by assigning the role of "guarantor" and "organiser" to national legislation. Externally, the EU forms an integral part of a postmodern trend in international capitalism, which increases processes of privatization of the law and promotes a stronger legal culture of contract. In this context, the EU has acquired a unique role, acting on the one hand as a liberalizing force for international capitalism and, on the other, as a regulator of globalizing economic forces.¹⁷ In this context, the new forms of governance that have come to life should therefore be seen as a product of the contingencies of history and transnationalism, with multiple overlapping and conflicting jurisdiscape.¹⁸ The blurring of the public-private divide has significant implications in relation to the question of the EU's polity identity as it raises questions on whether government is public, private or a combination of the two. In this broad and fluid "fusion zone" the public sector becomes more open to the dynamics, techniques and language of the market, whereas private actors have to deal with conditions set by public authority or integrate broader citizen concerns on their own initiative and to improve their market position, often under the banner of corporate social responsibility.¹⁹

This new scenario in global governance can be seen in the context of social trade where the EU has started to deploy a mixture of law and policy instruments and interacting with different actors to foster the trade-labour linkage, particularly in the context of the new generation of free trade agreements (FTAs) where organized civil society has been given an important role in the implementation

¹⁵ O. Lobel, 'The Renewal Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', 89 *Minnesota Law Review* 2004, at 364.

¹⁶ *ibid.*, at 366.

¹⁷ S. Velluti, *New Governance and the European Employment Strategy* (London: Routledge 2010) p. 15.

¹⁸ A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalisation* (Minneapolis MN: University of Minnesota Press 1996).

¹⁹ S. Smismans, 'Governance: The Solution for Active European Citizenship, or the End of Citizenship?' 13 *Columbia Journal of European Law* 2007, 619-620.

and monitoring of the Trade and Sustainable Development chapter of these agreements. As Reddy puts it: ²⁰

‘it is reasonable to suggest that the world trading system must be evaluated, at least in part, according to the consequences that it generates, and that these can in turn be assessed according to criteria which are, at least in part, public and shared. [...] International human rights instruments and global development goals, imperfect though they are, testify to the possibility of such concurrence.’

The EU constitutes a formidable platform for developing an integrated system to further diverse goals through the coordinated action of various institutions. It is a regional body with an embedded integrated approach to goals as evidenced increasingly by its Internal Market law and policy, which relies on a common institutional structure and the combined use of negative and positive forms of harmonization for achieving them. Moreover, as a regional entity with a “global vocation”²¹ to promote global human rights, the EU now has a regulatory framework enabling it to mobilize various instruments of governance in a social perspective.²²

The EU stands as a model of highly competitive social market economy²³ ‘reflecting the ambition of furthering diverse economic and social aims simultaneously, however much that model is both incomplete and under threat.’²⁴ The Treaty of Lisbon has refocused attention on a holistic approach to European integration and the goals of full employment, social progress and cohesion have been relaunched in the context of a new ‘highly competitive social market economy’.²⁵ These goals cannot be ignored when seeking to promote fair and sustainable market growth. Article 9 TFEU promotes social mainstreaming for the attainment of these non-economic goals and may thus be defined as a “horizontal social clause”, which is in line with other horizontal clauses in the TFEU concerning gender equality, environmental protection, consumer protection and the fight against discrimination²⁶ and has to be taken into account in the adoption and implementation of all EU actions and policies,²⁷

²⁰ S. Reddy, ‘Foreword. International Trade as a Means to Diverse Ends: Development, Workers, the Environment, and Global Public Goods’ in O. De Schutter, *Trade in Service of Sustainable Development* (Oxford: Hart Publishing 2015) p. v.

²¹ M. Cremona, ‘Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context’ 38 *Common Market Law Review* 2001, 359-396.

²² A. Perulli, ‘Fundamental Social Rights, Market Regulation and EU External Action’, 30 *The International Journal of Comparative Labour Law and Industrial Relations* 2014, at 37.

²³ Article 3(3) TEU.

²⁴ See S. Reddy, *supra* note 20, at xv; for further analysis, see D. Damjanovic, ‘The EU Market Rules as Social Market Rules: Why the EU can be a Social Market Economy’ 50 *Common Market Law Review* 2013, 1685-1718.

²⁵ See A. Perulli, *supra* note 22, at 34.

²⁶ Articles 8, 10, 11 and 12 TFEU.

²⁷ See A. Perulli, *supra* note 22, at 34.

including external relations.

Article 3 TEU and Articles 34-36 in Chapter IV on 'Solidarity' of the EU Charter of Fundamental Rights and Freedoms, which can be considered the main provisions for adopting redistributive social policies, while not justiciable²⁸ or not creating new competences for the Union with regard to these welfare areas,²⁹ remain nevertheless legal norms which can be used within the negative welfare integration process and thus be employed for developing the EU social market economy.³⁰ EU market rules, namely competition and state aid law, the free movement rules and the public procurement rules, can also be read as enabling social market rules for the creation of a social market economy, particularly after the revisions of the Treaty of Lisbon.³¹ This is not to deny that at present the way labour rights are balanced against economic rights such as, for example, the right to provide services in the Internal Market remains problematic or that labour law standards are somewhat restricted because they need to comply with economic paradigms. *Laval*,³² *Rüffert*,³³ *Bundesdruckerei*³⁴ and *Regiopost*³⁵ illustrate how socially responsible public procurement remains difficult to pursue and thus confirm the downgrading of labour law standards' relevance. However, the argument that this cannot change in the future should not be entirely dismissed. That the EU is, or better-said, portrays itself as a model of social market economy, can be seen by the fact that the promotion of non-commercial objectives through trade relations has gained significant prominence in EU external action, particularly since the entry into force of the Treaty of Lisbon. The latter reinforced the EU's external commercial competence³⁶ whilst, at the same time, injecting a normative dimension in its international relations

²⁸ The main reason of their lack of justiciability is that they are mainly construed as principles; the difference between rights and principles is enshrined in Articles 51(1) and 52(5) of the EU Charter. In particular, the latter speaks about principles being 'judicially cognisable' only in relation to the interpretation of their implementing acts and the ruling on their legality. For further examination, see M. Delfino, 'The Court and the Charter. A "Consistent" Interpretation of Fundamental Social Rights and Principles' 6 *European Labour Law Journal* 2015, 86-99 and S. Robin-Olivier, 'The Contribution of the Charter of Fundamental Rights to the protection of social rights in the European Union: a first assessment after Lisbon' 1 *European Journal of Human Rights* 2013, 109-134.

²⁹ Article 51(2) of the EU Charter.

³⁰ See D. Damjanovic, *supra* note 24, at 1715.

³¹ *ibid.*, at 1689.

³² Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809.

³³ Case C-346/06, *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189.

³⁴ Case C-549/13, *Bundesdruckerei GmbH v Stadt Dortmund* ECLI:EU:C:2014:2235.

³⁵ Case-115/14 *RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz* ECLI:EU:C:2015:760. The decision in *Regiopost* highlights once again the complexities of using contracts to pursue contract-unrelated policies such as social considerations. While it reverses *Rüffert* thus opening new horizons for the protection of posted workers and space for regional protection, collective negotiation and action remain restricted.

³⁶ Article 3(1)e TFEU and Articles 206 and 207 TFEU and 218 TFEU (in relation to the increased powers of the EU Parliament in the CCP).

via Articles 3(5) and 21(1) TEU, thus advancing values, principles and objectives that are emphatically presented as “European” and whose universal application is sought via explicit reference to compliance with international law.³⁷ Further, the objective of consistency has also been included in the CCP with the obligation for the Union to conduct its policy in the broader context of the principles and objectives of the Union’s external action.³⁸ In addition, there is an obligation to respect human rights externally pursuant to Article 21(3)(1) TEU.³⁹ Through the insertion of foreign policy objectives, the EU’s “common ideology”, enshrined largely in the Treaty on European Union, has now acquired an external dimension, which also expresses the core principles of how its community is to shape the international order and a particular vision of global governance itself.⁴⁰

3. THE FOUNDATIONS OF THE TRADE-LABOUR LINKAGE

3.1. THE TRADE-LABOUR LINKAGE RATIONALES

Various rationales for including labour provisions in trade agreements have been put forward, namely, a social, economic and human rights rationale.⁴¹ The overarching reason is the existence of interdependence between different set of problems and objectives.⁴² Following on from this is the other equally important rationale of creating incentives for actors and, in particular, states to take actions which are desirable or to refrain from taking actions which are undesirable in terms of labour standards.⁴³ The social rationale aims at providing redress against the negative social effects of globalisation processes and it is meant to ensure the enforcement of domestic labour laws concerning the protection of workers in compliance with common international labour standards thus reflecting a broader concern for safeguarding social protection. The economic

³⁷ S. Velluti, ‘Human rights conditionality in the EU GSP scheme: “a focus on those in need or a need to refocus?”’ in Ferreira, N. and Kostakopoulou, D. (eds) *The human face of the European Union: is EU law and policy humane enough?* (Cambridge: Cambridge University Press 2016), *forthcoming*.

³⁸ Articles 207(1) TFEU; 3(5) TEU.

³⁹ L. Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ 25 *European Journal of International Law* 2014, 1071-1091; cfr. E. Cannizzaro, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects: A Reply to Lorand Bartels’ 25 *European Journal of International Law* 2014, 1093-1099.

⁴⁰ J. Larik, ‘Entrenching Global Governance: The EU’s Constitutional Objectives Caught Between a Sanguine World View and a Daunting Reality’ in B. Van Vooren et al. (eds) *The EU’s Role in Global Governance* (Oxford: Oxford University Press 2013) p. 20.

⁴¹ ILO, Report on *The Social Dimensions of Free Trade Agreements*, 6 November 2013, 6-7, available at <http://www.ilo.org/global/research/publications/WCMS_228965/lang-en/index.htm>; see also European Commission, Final report on *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, 15 September 2008, Chapter 2, available at <<http://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=480>> accessed 10 December 2014.

⁴² See S. Reddy, *supra* note 20, at vi-xi.

⁴³ *ibid.*, at ix-xi.

rationale is premised on the idea of using labour provisions as tools to prevent unfair competition by ensuring a level playing-field to encourage labour standards in the exporting country that are comparable with those in the importing country. In this context fair trade is thus a means to implement free trade.⁴⁴ The International Labour Organization (ILO) Constitution Preamble provides that: 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.'⁴⁵ Arguably, any WTO member could claim that another member's failure to respect social rights impedes its ability to uphold social rights within its own territory.⁴⁶ The reason would be that a state's tolerance of labour violations could significantly undermine another state's protection of labour by increasing the pressure on that state to tolerate similar labour abuses or risk losing investments to the violation.⁴⁷ In the 2008 ILO Declaration on Social Justice for a Fair Globalization⁴⁸ it is stated that: 'the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.' The Declaration recognized the impact of trade and financial policies on employment and social rights and referred to the need to develop and employ an integrated approach in the promotion of decent work, through the cooperation with other international and regional organizations.⁴⁹ The human rights rationale uses labour provisions as a means for ensuring respect for labour-related human rights that reflect values universally accepted by the international community and also for improving labour standards generally.

The existence of such diverse rationales underlying the labour-trade linkage requires us to acknowledge that there isn't a single, privileged form of justification for rights. To date there has been a tendency to believe that engaging philosophically with human rights equates to engaging with them as a by-product of some commitment to a broader moral theory.⁵⁰ As Tasioulas aptly points out, this is a limitative and privileged vision of how to conceive a philosophical account of human rights' justification and such an approach must be challenged, precisely because there may be overlapping strands that go towards justifying each right.⁵¹ What matters is that we attempt to make sense

⁴⁴ See A. Perulli, *supra* note 22, at 31.

⁴⁵ International Labour Organisation (ILO), Constitution of the International Labour Organisation (ILO), 1 April 1919.

⁴⁶ C. Thomas, 'The WTO and Labour Rights: Strategies of Linkage' in S. Joseph *et al.* (eds.) *The World Trade Organisation and Human Rights. Interdisciplinary Perspectives* (Cheltenham: Elgar 2009), at 257.

⁴⁷ *idem.*

⁴⁸ Available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf>.

⁴⁹ See A. Perulli, *supra* note 22, at 31.

⁵⁰ J. Tasioulas, *On Human Rights*, available at <<http://fivebooks.com/interview/human-rights/>>.

⁵¹ *idem.*

of human rights⁵² and abandon the philosophical mistake to reduce everything to a system where everything follows from a set of given principles.⁵³

3.2. THE EU CONTEXT AND THE DEMOCRATISING ROLE OF THE EUROPEAN PARLIAMENT

Three broad forces have maintained and increased the demand for EU social measures linked to transnational trade processes: the pace of globalisation; the risk of trade policy failure and associated adjustment measures as well as changes in the institutional framework of key international organisations.⁵⁴ The EU Parliament's increased role and visibility in EU external relations following the changes introduced by the Treaty of Lisbon also constitutes an important factor in furthering the social dimension of EU international trade agreements. According to a study that looks at why the EU Parliament is such a strong supporter of linking social norms to EU trade policy, the notion of social trade is a story-line around which coalitions in the EU Parliament can unite, because its construction is vague and can thus be subject to different interpretations.⁵⁵ This is good in terms of yielding broad consensus among very different political groups within the EU Parliament, but it is bound to generate provisions in legislative measures or clauses in international agreements, which are watered down in terms of their legal enforceability to the extent that it will be harder to ensure effective implementation and coherence in terms of results, the Trade and Sustainable Development Chapter in the new FTAs is a case in point. As the analysis shows further below, what we end up having is an asymmetric relationship between the labour and trade provisions whereby the former are either not prescriptive in nature or not legally enforceable.

The EU Parliament remains a strong advocate of the trade-labour linkage. This flows from its ongoing commitment to the protection of human rights *lato sensu* as well as its democratic legitimisation function that may be said to be independent and separate from that of the Member States. The Treaty of Lisbon has given the EU Parliament a stronger role in relation to the conclusion of international agreements, which is of great significance given that it constitutes a formally independent voice for EU citizens.⁵⁶ The EU Parliament has been given

⁵² J. Nickel, *Making Sense of Human Rights* (Oxford: Wiley-Blackwell 2007).

⁵³ See J. Tasioulas, *supra* note 50.

⁵⁴ S. Velluti, 'The EU's social dimension in its external trade relations' in A. Marx *et al.* (eds.), *Global Governance of Labour Rights. Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Cheltenham: Elgar 2015), 42-62.

⁵⁵ L. Van den Putte, 'Divided We Stand – The European Parliament's Position on Social Trade in the Post-Lisbon Era' in A. Marx *et al.* (eds.), *supra* note 54, 63-82.

⁵⁶ On the powers of the EU Parliament in the external relations of the EU post-Lisbon, see C. Eckes, 'How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures', Jean Monnet Working Paper 12/14, available at <<http://jeanmonnetprogram.org/paper/how-the-european-parliaments-participation-in-international-relations-affects-the-deep-tissue-of-the-eus-power-structures/>>; K. Raube and J. Wouters, 'The Many Facets of Parliamentary Involvement and Interaction in EU External Relations', Leuven Centre for Global Governance Studies, Working Paper No. 174 – April 2016.

a right to be informed at all stages of the procedure for adopting international agreements.⁵⁷ It has also acquired a general power of veto by either giving consent or rejecting international agreements.⁵⁸ It is noticeable, however, that the EU Parliament cannot introduce amendments to the text of the proposed agreement but only entirely approve it or entirely reject it. There is thus no *ex ante* formal control of the EU Parliament envisaged in Article 218 TFEU.⁵⁹ In spite of this limitation, since the entry into force of the Treaty of Lisbon the EU Parliament has used its increased powers forcefully and it has refused to give its consent to various international agreements such as the Terrorist Finance Tracking Program (TFTP) with the United States⁶⁰ to protect data protection rights of EU citizens⁶¹ and the multilateral Anti-Counterfeiting Trade Agreement (ACTA)⁶² for potential threat to civil liberties.⁶³ Similarly, the EU Parliament has refused to give its consent to the EU-Morocco Fisheries Partnership Agreement⁶⁴ *inter alia* because further to the 2002 Opinion of the UN Legal Counsel Hans Corell there was no evidence in the agreement that the fishery activities were to

⁵⁷ Article 218(10) TFEU (and specifically for international trade agreements Article 207(3) TFEU); see also the Framework Agreement on Relations between the European Parliament and the Commission, OJ [2010] L304/47, 20.11.2010, Annex 11, which goes beyond the strict wording of the Treaty on the Functioning of the EU thereby strengthening the EU Parliament's role in the negotiations and conclusion of international agreements. It could be argued that this agreement is an expression of the duty of sincere cooperation under Article 4(3) TEU and the principle of inter-institutional balance as per Article 13(2) TEU; see also Case C-658/11 *European Parliament v Council* ECLI: EU:C:2014:2025 (the *Mauritius* case).

⁵⁸ Article 218(6)(a) (i)-(v) TFEU; compare with former Article 300(3) subpara. 2 TEC.

⁵⁹ A. Ripoll Servent, 'The Role of the European parliament in international negotiations after Lisbon' 21 *Journal of European Public Policy* 2014, 568-586.

⁶⁰ Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, OJ [2010] L8/11, 13.1.2010.

⁶¹ European Parliament, P7_TA(2010)0029 Legislative Resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (05305/1/2010 REV 1 – C7-0004/2010 – 2009/0190(NLE)).

⁶² Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, 12195/11, 2011.

⁶³ European Parliament, P7_TA-PROV(2012)0287. Legislative Resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, 12195/11, 2011-C7-0027/2012-2011/0167(NLE)).

⁶⁴ European Parliament, P7_TA(2011)0569, Legislative Resolution of 14 December 2011 on the draft Council decision on the conclusion of a Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (11226/2011-C7-0201/2011-2011/0139(NLE)).

the benefit of, and according to, the wishes of the people of Western Sahara.⁶⁵ In *Frente Polisario* the EU General Court (GC) has ordered the partial annulment of a Council Decision on the conclusion of an agricultural, processed agricultural and fisheries products agreement with Morocco insofar as it is applied to Western Sahara.⁶⁶ As explained by Vidigal,⁶⁷ this landmark ruling is important in a number of respects. First, the EU is under an obligation to ensure respect for the fundamental rights of non-EU nationals in non-EU territory.⁶⁸ Second, “entirely neutral” agreements, which do not require the violation of fundamental rights, may still fail to conform to this obligation if they favour the occurrence of such a violation.⁶⁹ Third, the fact that an agreement may ‘indirectly encourage’ the violations of fundamental rights, or that the EU ‘benefits from them’, is sufficient to trigger the duty to take into account the specific elements of the agreement.⁷⁰ In other words, even if a violation of fundamental rights is not an object of the agreement, such a violation may be its *consequence* or an *effect*.⁷¹ With regard to the ILO Conventions and in particular CLS, in December 2011 the EU Parliament voted to block the textile agreement between the EU and Uzbekistan for the country’s continuous use of a state-sponsored system of cotton production based on forced labour of children and adults.⁷²

From the above, we can see that with the Treaty of Lisbon the EU Parliament has acquired renewed democratic legitimation and monitoring control functions in relation to international agreements that it clearly intends to exercise. Combined with its promotion of human rights generally the EU Parliament has undoubtedly acquired an increasingly important role in relation to social trade.

3.3. SOCIAL TRADE AS AN “UNOBJECTIONABLE NORM” AND THE EU’S NEW COMMON COMMERCIAL POLICY

The analysis carried out in the preceding sections helps us to understand the reasons for the widening and deepening of labour provisions in EU trade

⁶⁵ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, United Nations Security Council, S/2002/161, 12 February 2002, available at: <<http://www.arso.org/UNlegaladv.htm>>.

⁶⁶ Council Decision 2012/497/EU of 8 March 2012; Case T-512/12 *Frente Polisario v Council of the European Union* ECLI:EU:T:2015:953 (nir). An appeal against this decision has been lodged before the CJEU, Case-104/16 P *Council v Frente Polisario* ECLI:EU:C:2016:232 (pending case).

⁶⁷ G. Vidigal, ‘Trade Agreements, EU Law, and Occupied Territories (2): The General Court Judgment in *Frente Polisario v Council* and the Protection of Fundamental Rights Abroad’ EJIL: Talk!, 11 December 2015, available at <<http://www.ejiltalk.org/13901-2/>>.

⁶⁸ Case-104/16 P, paras. 227-228.

⁶⁹ Case-104/16 P, paras. 239-241 and 246.

⁷⁰ Case-104/16 P, paras. 231 and 238.

⁷¹ See Vidigal, *supra* note 67.

⁷² EU Parliament Resolution of 15 December 2011 on the draft Council decision on the conclusion of a Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part, amending the Agreement in order to extend the provisions of the Agreement to bilateral trade in textiles, taking account of the expiry of the bilateral textiles Agreement (16384/2010 – C7-0097/2011 – 2010/0323(NLE)), P7_TA(2011)0586.

agreements and why social trade has rapidly become an “unobjectionable norm” in the EU context, which has also been used to find public support in the face of criticism against FTAs.⁷³ The status of “unobjectionable norm” acquired by social trade has become embedded in EU discourse and practice not only externally but also internally. The EU is integrating social, labour and environmental standards in important areas of the Internal Market, such as for example public procurement, as illustrated by Directive 2014/24/EU.⁷⁴ The Directive links public procurement with sustainable development and injects an approach based on social responsibility and solidarity. At all stages of the procedure there is now an obligation for Member States and contracting authorities to comply with social and environmental legislation and labour law and to combat excessively low tenders.⁷⁵ Another example is the Renewable Energy Directive,⁷⁶ which introduces “social sustainability criteria” and linked to the latter a reporting system concerning the ratification and implementation of certain conventions of the ILO.⁷⁷

The Treaty of Lisbon has constitutionalized this complementarity and parallelism between the internal and external dimension of EU action first developed by the Court of Justice of the European Union (CJEU).⁷⁸ With regard to the scope of the CCP, this entails that when the EU exercises its powers under the

⁷³ L. Van den Putte and J. Orbie, ‘EU bilateral agreements and the surprising rise of labour provisions’ 31 *International Journal of Comparative Labour Law and Industrial Relations* 2015, 263-283.

⁷⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ [2014] L94/65, 28.3.2014; for further analysis, see E. Van den Abeele, ‘Integrating social and environmental dimensions in public procurement: one small step for the Internal Market, one giant leap for the EU?’ ETUI Working Paper 2014.08, available at <<http://www.etui.org/Publications2/Working-Papers>>.

⁷⁵ Article 18(2) and Recital 37; Annex X which lists the International Social and Environmental Conventions mentioned in Article 18(2), Article 69; see also Article 71 which is aimed at preventing subcontracting chains.

⁷⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ [2009] L 140/16, 5.6.2009.

⁷⁷ For further analysis, see A. Lendle and M. Schaus, ‘Sustainability Criteria in the EU Renewable Energy Directive: Consistent with WTO Rules?’ ICTSD information note No. 2, SEPTEMBER 2010, available at <<http://www.ictsd.org/downloads/2011/12/sustainability-criteria-in-the-eu-renewable-energy-directive-consistent-with-wto-rules.pdf>>; L. German and G. Schoneveld, ‘Social sustainability of EU-approved voluntary schemes for biofuels Implications for rural livelihoods’ Center for International Forestry Research, Working Paper 75/2011, available at <http://www.cifor.org/publications/pdf_files/WPapers/WP75German.pdf>; S. Bigerna, C. A. Bollino and S. Micheli, *The Sustainability of Renewable Energy in Europe* (Heidelberg: Springer 2015); information on national action plans and progress reports is available at <<https://ec.europa.eu/energy/en/topics/renewable-energy/renewable-energy-directive>>.

⁷⁸ Joined Cases 3, 4 and 6/76, *Cornelis Kramer and Others* [1976] ECR 1279 and Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741. Article 21(3) TEU provides that the Union’s general external policy objectives should be respected and pursued also in “the development and implementation of the external aspects of its other policies” and Article 207 (3)-(2) TFEU provides that the EU’s CCP agreements shall be compatible with internal Union policies and rules; Article 207(6)(a) TFEU establishes explicit parallelism between internal and external EU competences. External powers cannot be used to override the limits of internal Union competence with regard to the same subject matter.

CCP, it is subject to the same limitations on its competence that exist in the Internal Market with regard to the same subject matter. However, as Dimopoulos posits: ‘this does not mean that the lack of exercise of Union internal competences poses a limitation on the existence or the exercise of external competence’.⁷⁹ New Article 207 TFEU somewhat differs from its predecessor⁸⁰ as it enables the EU to depart from a strict parallelism between internal and external economic relations⁸¹ thus marking a new approach of the CJEU to the objectives of the EU in the context of the CCP, from “evolutionary” to “global”.⁸² The shift towards a “global approach” in its interpretation of Treaty provisions is particularly salient for the purposes of the present analysis as the CJEU’s departure from the confines of the Internal Market can be of aid in broadening the scope of the EU’s CCP provided that a given EU measure falls within the remit of international trade and, more generally, is also in line with post Lisbon EU policy developments.

The overarching changes brought about by the new globalisation forces of the 21st century has also led to a new conceptualisation of EU trade policy, which was first envisioned in the 2010 *Trade, Growth and World Affairs* (TGWA) Strategy.⁸³ This Communication signaled a departure from EU trade policy largely based on trade in goods and customs tariffs to one based on the three pillars, of trade in goods, trade in services and investment with a focus on non-tariff barriers, standards, domestic taxation and competition. At the same time, the TGWA recognised that globalisation processes impact negatively on certain sectors of the economy and specific categories of workers and cause environmental damage (thus suggesting the European Globalization Adjustment Fund (EGAF) as a means to provide some form of redress). In the new EU trade strategy *Trade for all - Towards a more responsible trade and investment policy*⁸⁴ this shift in focus has been further expanded in order to include a parallel concern for the environment, human rights, including social rights with explicit reference to the EGAF as a meaningful remedy for consumers, workers and small and medium enterprises (SMEs). In addition, there is explicit reference to using trade agreements and trade preference programmes as levers to promote around the world values such as sustainable development, human rights, fair and

⁷⁹ A. Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?’ 4 *Croatian Yearbook of European Law and Policy* 2008, 102, at 118.

⁸⁰ Former Article 133 EC.

⁸¹ See Dimopoulos, *supra* note 79.

⁸² H. H. Voogsgaard, ‘The Nature of the Asymmetry between Trade and Labour Rights in Trade Agreements of the EU’, paper presented at the European Union in International Affairs (EUIA) Biennial Conference, Brussels, Belgium, 11-13 May 2016. This interpretative approach of the CJEU can be seen in the *Daiichi Sankyo* case where an act of the EU concerning intellectual property issues was in dispute; Case C-414/11 *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon* ECLI:EU:C:2013:520.

⁸³ COM(2010)612.

⁸⁴ Available at <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>.

ethical trade and the fight against corruption as well as improving the responsibility of supply chains.

4. EU TRADE EMBEDDED DEVELOPMENT MODELS

4.1 UNILATERAL TRADE ARRANGEMENTS: THE GSP SCHEME

The EU's GSP is an autonomous non-contractual and non-reciprocal trade arrangement which was first set up in 1971 (and since then subject to periodical revision) through which the EU provides preferential access to the EU market to a certain number of developing countries and territories, in the form of reduced tariffs for their goods when entering the EU market. To this end, it accords tariff preferences to countries, which fulfil certain economic criteria in terms of poverty and non-diversification of exports. Social considerations, however, were inserted in the scheme only in January 1995 when the new GSP scheme for industrial products entered into force. The first objective pursued by the GSP is to contribute to the growth of developing countries' economies by helping them reduce poverty. Secondly, it also aims at improving their political and social situation by promoting good governance and sustainable development.

In 2005 the GSP+ incentive regime was set up following the decision handed down by the WTO Appellate Body in January 2004, which upheld the findings of the WTO adjudicating panel concluding the WTO-inconsistency of the EU's GSP scheme in relation to its drug arrangements.⁸⁵ The incentive scheme offers additional benefits under certain conditions to support vulnerable countries in their ratification and implementation of international conventions, including ILO Conventions. To qualify for GSP+, countries must ratify and effectively implement international standards in the field of human rights, Core Labour Standards (CLS), sustainable development and good governance.⁸⁶ In particular, since 2005 GSP+ beneficiaries need to ratify and effectively implement all eight ILO fundamental conventions that together make up the four CLS,⁸⁷ which enhances the legitimacy of the ILO labour standards laid down in these conventions.

⁸⁵ *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (2003) [7.161] (Report of the Panel) ('*Tariff Preferences Panel Report*'); WTO Doc WT/DS246/AB/R, AB-2004-1 (2004) (Report of the Appellate Body) ('*Tariff Preferences Appellate Body Report*').

⁸⁶ For a list of the 27 core conventions, see Annex VIII of Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ L303/1, 31.10.2012, p. 1.

⁸⁷ The eight ILO Conventions are: (i) freedom of association and the right to collective bargaining (Conventions 87 and 98); (ii) the elimination of all forms of forced or compulsory labour (Conventions 29 and 105); (iii) the effective abolition of child labour (Conventions 138 and 182); and (iv) the elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

The preferences granted by the GSP+ may be withdrawn from the beneficiary if the latter fails to implement the necessary Conventions. There is also the special EBA arrangement, pursuant to which the Least Developed Countries (LDCs) receive full duty and quota-free access to the EU market with the exception of arms and armaments. The EU pursues a two-fold objective with these unilateral trade reference schemes: on the one hand, it rewards countries that are vulnerable but willing to ratify and implement key International Conventions on sustainable development, including human rights and CLS, with additional tariff reductions under GSP+; on the other hand, it will temporarily withdraw GSP preferences in case of serious and continued violations of these Conventions. As we will see in the next section, the EU has used its power to withdraw access from beneficiary countries very rarely, and only in response to grave violations of ILO labour standards rather than human rights more generally. The above buttresses arguments according to which, despite its purported development goals, and in particular as an effort to improve the value of preferences for the “neediest”, the GSP scheme is used as a tool to improve the EU’S leverage in trade negotiations with emerging economies.

Assessing the effectiveness of the trade-labour linkage in EU unilateral trade arrangements: the case of the GSP+

Benefits under the GSP+ incentive scheme are seldom withdrawn. Where they are withdrawn this is temporary reflecting the EU’s intention to use GSP conditionality as a “carrot”, namely, an incentive to make progress on human rights, sustainable development and good governance.

The effects of withdrawal of GSP+ benefits have varied. For example, in 2008 the Commission opened an investigation into El Salvador, following a judgment of the El Salvador Supreme Court that El Salvador’s ratification of ILO Convention No 87 on freedom of association and the right to organise was unconstitutional.⁸⁸ The prospect of loss of access to GSP+ benefits appears to have been instrumental in persuading the El Salvadorian government to amend the Constitution so as to render ratification of the Convention constitutional and the Commission therefore terminated the investigation as it found that there was no longer reason for justifying the temporary withdrawal of the GSP+. ⁸⁹ Similarly, the Commission initiated an investigation into Bolivia concerning the effective implementation of the United Nations Single Convention on Narcotic Drugs ⁹⁰

⁸⁸ European Commission, Decision 2008/316/EC of 31 March 2008 providing for the initiation of an investigation pursuant to Article 18(2) of Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organize in El Salvador *OJ* [2008] L 108/29, 18 April 2008.

⁸⁹ European Commission, Report of the Investigation pursuant to Article 18(2) of the Council Regulation (EC) No 980/2005 with respect to the protection of the freedom of association and the right to organize in El Salvador, C(2009) 7934 (2009).

⁹⁰ European Commission, Implementing Decision 2012/161/EU of 19 March 2012 providing for the initiation of an investigation pursuant to Article 17(2) of Council Regulation (EC) No

following Bolivia's decision to withdraw from the said Convention as of 1 January 2012. However, Bolivia continued to give effect to the Convention and on 10 January 2013 Bolivia's request to re-accede was accepted. Consequently, the Commission stopped its investigation in March 2013.

The case of Sri Lanka differs from those of El Salvador and Bolivia. A Commission investigation, drawing on United Nations (UN) reports and statements as well as findings of human rights non-governmental organizations (NGOs), found widespread violations of the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture (CAT) and the 1989 Convention on the Rights of the Child (CRC). The Commission proposal to withdraw access to the GSP+ from Sri Lanka that followed this investigation was not sufficiently persuasive to convince the Sri Lankan government to take adequate measures to address the violations identified by the investigation. Sri Lanka was then temporarily suspended from the GSP+ scheme in August 2010.⁹¹ Prior to this the Commission had offered to delay the entry into force of the withdrawal by six months (decision was made in January 2010) in exchange of 'tangible and sustainable progress on a number of outstanding issues'.⁹²

While it is not clear whether the EU's GSP+ scheme is fully WTO compliant – particularly with the Most-Favoured Nation (MFN) principle (Article I:1 GATT) on the basis of the exceptions provided under Article XX GATT- questions have arisen concerning the lack of transparency in the decision-making process pursuant to which third countries are granted GSP+ preferences, as well as issues of selective conditionality and double standards.⁹³ There have also been questions concerning the review of implementation of the relevant Convention requirements for the granting of GSP+ benefits. In particular, the monitoring of the GSP+ has been subject to criticism due to various GSP+ beneficiary countries having a particularly poor record as regards one or more CLS. Infringements of CLS have often been reported⁹⁴ and the EU Parliament has continuously called upon the Commission to monitor more strictly the compliance with ILO labour standards and asked for the suspension of preferences in respect of countries that breach fundamental rights. In addition, according to a study conducted by

732/2008 with respect to the effective implementation of the United Nations Single Convention on Narcotic Drugs in Bolivia *OJ* [2012] L 80, 20.3.2012, p. 30.

⁹¹ European Commission, Implementing Regulation (EU) No 143/2010 of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provided under the Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, *OJ* [2010] L 45/2010, 22.7.2010, p.1.

⁹² European Commission, Press release, 'EU regrets silence of Sri Lanka regarding preferential import regime' of 5 July 2010, IP/10/888, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=589%20>>, accessed 4 January 2016.

⁹³ See Velluti, *supra* note 37.

⁹⁴ EU Parliament, Report on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility (2010/2205(INI)), Committee on Employment and Social Affairs, A7-0172/2011, of 20 April 2011.

CARIS ⁹⁵ the GSP+ scheme and its conditionality has not yet resulted in significant changes in the situation “on the ground” in beneficiary countries. Some of these problems have been addressed by the revised GSP which entered into force in 2014, examined below.

Reform of the GSP

In 2012 the EU adopted a reformed GSP law with the aim of strengthening the overall effectiveness of the GSP scheme. ⁹⁶ The reform tackled some of the above problems. It reduced the number of beneficiaries focusing on those developing countries most in need and reinforcing the incentives in respect of core human and labour rights, and environmental and good governance standards. ⁹⁷ With regard to the labour criteria for the GSP+, according to Article 9(1) of the 2012 GSP Regulation a beneficiary country can now benefit from the enhanced preferences if:

- (1) it has ratified all the conventions listed in Annex VIII and the most recent available conclusions of the relevant monitoring bodies do not identify a ‘serious failure’ to effectively implement any of these conventions;
- (2) it gives a binding undertaking to maintain ratification of the conventions listed in Annex VIII and to ensure their effective implementation;
- (3) it accepts without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the conventions listed in Annex VIII; and
- (4) it gives a binding undertaking to participate in and cooperate with the monitoring procedure referred to in Article 13.

For Vogt ⁹⁸ the revised eligibility criteria is a step back from the previous labour criteria as an applicant country could be deemed eligible for the GSP+ so long as the relevant monitoring bodies have not identified a “serious failure” to effectively implement the Conventions. He also argues that the standard of “serious failure” is too low and reference to most recent reports of monitoring bodies is limitative. Specifically, the Commission will consider whether there is a “serious” violation for purposes of entry into the GSP+ only if there is a “special paragraph” in the report of the ILO Committee on Application of Standards (CAS)

⁹⁵ See CARIS, *supra* note 4, at 166.

⁹⁶ Regulation (EU) No. 978/2012 of the European Parliament and of Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 *OJ* [2012] L303/1, 31.10.2012.

⁹⁷ The list of beneficiaries has been modified several times to reflect the exit from and the entry of countries newly meeting the eligibility conditions for each of the three types of arrangements since the first modifications effected with the 2012 reform, which at the time of writing is as follows: 30 GSP, 13 GSP+ and 49 EBA beneficiaries; European Commission, Report from the Commission to the European Parliament and the Council, Report on the Generalised Scheme of Preferences Covering the Period 2014-2015, COM(2016) 29 final, Brussels, 28.1.2016.

⁹⁸ See J. Vogt, *supra* note 3.

to the International Labour Conference. There is no textual support in the 2012 GSP Regulation for such a narrow interpretation and reference is made only in staff working documents of the Commission. Moreover, the restrictive interpretation of the entry criteria for the GSP+ does not take into account the overall supervisory system of the ILO which is made up of various committees of experts. This constitutes a significant limitation of the GSP+ scheme as it allows countries that do not comply with the ILO Conventions to become or remain GSP+ beneficiaries. For example, in 2014 Pakistan and Guatemala – two notorious labour rights violators- were granted GSP+. While the decision to include Pakistan in the GSP+ may have justification on humanitarian grounds further to the devastating flooding of 2010 thus showing a willingness on the part of the EU to support the economy of this country through trade measures, the inclusion of Guatemala in the GSP+ is more difficult to justify. It is particularly disconcerting considering that this country has appeared before the CAS more than any other country (including Myanmar which was suspended from the standard GSP scheme in 1997 for forced labour practices and reinstated only in 2012) and is faced with the continuous threat of a Commission of Inquiry at the ILO for serious and systematic violations of the Freedom of Association and Protection of the Right to Organize Convention (No. 87).⁹⁹ In 2011 the US initiated arbitration against Guatemala under Article 16(2)a of the 2004 Dominican Republic - Central America – United States Free Trade Agreement (CAFTA-DR).¹⁰⁰ The US v Guatemala arbitration should have been a fairly expedited process further to Chapter 20 of the CAFTA-DR which provides for a fast-track arbitration procedure. However, after initiating this punitive approach the US subsequently moved to a more cooperative approach further to a series of enhanced labour enforcement measures that Guatemala agreed to pursue. These measures included the hiring of significant numbers of new labour inspectors and the creation of fast-track processes for labour courts to adopt fines recommended by Guatemala's Ministry of Labor for labour law violations. Hence, the filing of a CAFTA state-to-state arbitration used as a "stick" clearly led to the diplomatic "engagement" between the US and Guatemala. In September 2014 the US announced that it would finally proceed to arbitration against Guatemala. Guatemala has ceased to be a GSP+ beneficiary country from January 1, 2016. However, the reason for this is that it benefits from preferential market access under the 2012 EU-Central America trade agreement and not because of a decision of the Commission to withdraw GSP+ preferential treatment for labour rights abuses.

⁹⁹ Further information is available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEEDURE_ID,P50012_LANG_CODE:3088000,en:NO and http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_419599.pdf, accessed 4 January 2016.

¹⁰⁰ Further information is available at <http://www.dol.gov/ilab/trade/agreements/guatemalasub.htm>, accessed 4 January 2016.

The monitoring of GSP+ compliance has been enhanced and the Commission has a key monitoring function in relation to the status of ratification and effective implementation of the Conventions as well as ensuring that the beneficiaries cooperate with the Conventions' monitoring bodies. Together with the European External Action Service ('EEAS'), the Commission has set up a structured monitoring process: an ongoing "GSP+ dialogue" with the beneficiary authorities, formalised through annual lists of issues known as "scorecards". Every two years the Commission reports to the EU Parliament and the Council on the fulfillment status of those conditions using scorecards for each GSP+ recipients.¹⁰¹ These scorecards are an important source of information for the Commission as it enables it not only to establish a form of cooperation with beneficiary countries through the so-called "GSP+ dialogue" but also to constructively discuss beneficiaries' commitments to the ILO Conventions within the relevant international organisations, such as the ILO Tripartite Committee on the Application of Standards or the ILO Governing Body.¹⁰² The limitation of this monitoring system is that it lacks transparency as the evaluation contained in these scorecards is not publicly available. In addition, since it involves only state actors, it is difficult to know whether these scorecards actually lead to government consultations.¹⁰³

In its 2016 report on the revised GSP scheme to the European Parliament and the Council,¹⁰⁴ which also includes an analysis of the GSP+ the Commission emphasised the importance of strengthening the EU's engagement with other international organisations, and their local offices in the beneficiary countries, such as the ILO and the United Nations (UN) to ensure that GSP+ monitoring and evaluation by the EU continuously takes into account their views and experiences. It also recognised the significance of a wide range of sources for gathering information including civil society, social partners, the European Parliament and the Council. GSP+ monitoring visits by the Commission, together with the assistance of EU Delegations, have also proven to be beneficial in this respect. The Commission has also stressed the importance of beneficiary countries taking ownership of the monitoring process and becoming more proactive in addressing the issues in the scorecards. In addition, the Commission

¹⁰¹ Article 14(1) of Regulation (EU) No. 978/2012, *supra* note 96.

¹⁰² European Commission, Joint Staff Working Document 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') covering the period 2014 – 2015. Accompanying the document Report from the Commission to the European Parliament and the Council Report on the Generalised Scheme of Preferences during the period 2014 – 2015 (COM(2016) 29 final), Brussels, 28.1.2016 (SWD(2016) 8 final).

¹⁰³ L. Van den Putte et al, 'What social face of the new EU trade agreements? Beyond the 'soft' approach', ETUI Policy Brief, No. 13/2015, at 3, available at <file:///C:/Users/Utente/Downloads/Policy%20Brief%202015.13%20Van%20den%20Putte%20et%20al.%20(1).pdf>.

¹⁰⁴ European Commission, Report from the Commission to the European Parliament and the Council, Report on the Generalised Scheme of Preferences Covering the Period 2014-2015, COM(2016) 29 final, Brussels, 28.1.2016.

has been funding cooperation projects in beneficiary countries such as the GSP+ pilot project on capacity building in partnership with the ILO in Pakistan, Mongolia, Guatemala and El Salvador to support local administrations to put administrative structures in place.¹⁰⁵

The GSP+ status shall be withdrawn temporarily in respect of all or certain products originating in the beneficiary country if the beneficiary country does not respect its binding undertakings.¹⁰⁶ The burden of proof of compliance with the Conventions is now on the beneficiary country. If the Commission has a 'reasonable doubt' that the country is not respecting its binding undertakings, it shall adopt a decision to initiate the procedure for withdrawal and shall inform the European Parliament and the Council of the EU. The Commission shall state grounds for the reasonable doubt, and specify a time not greater than six months for beneficiary country to submit its observations, during which the Commission will give every opportunity to cooperate. The Commission shall seek all information it considers necessary, *inter alia*, the conclusions and recommendations of the relevant monitoring bodies and in drawing its conclusions, it shall assess all relevant information.

To sum up, the reform has addressed some of the concerns previously raised by reducing the number of beneficiaries and by strengthening the monitoring of compliance. That said, the revised eligibility criteria, particularly those for the GSP+, are problematic as they can allow a country with a record of serious labour rights abuses to become eligible for the GSP+ scheme.

4.2 REGIONAL AND BILATERAL TRADE AGREEMENTS

After the failure at multilateral level to include a social clause in the WTO, the EU has been increasingly including labour provisions in its bilateral and regional agreements. Since the 1990s, most EU preferential agreements contain provisions on labour standards and cooperation in social affairs.¹⁰⁷ In the early agreements social norms have been taken up as issues for cooperation between the EU and its trading partners. In subsequent agreements social norms have been raised to the status of human rights.¹⁰⁸ The EU approach largely relies on

¹⁰⁵ As part of its on-going collaboration and cooperation with the ILO (ILO 2013), the European Commission has provided a grant to the ILO for a 2-year pilot-project to strengthen the capacity of public administrations to apply the eight Fundamental ILO Conventions. The project was launched on 1 October 2015 and consists of ILO technical assistance, workshops, trainings, as well as awareness-raising activities.

¹⁰⁶ As referred under Article 9, see Article 15 of Regulation (EU) No. 978/2012, *supra* note 96.

¹⁰⁷ Full text access to European FTAs and their labour provisions can be found at <http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang--en/index.htm#P4_728>.

¹⁰⁸ For example, the Preambles of the 1997 EU's Cooperation Agreements with Cambodia and Laos, Yemen and the Former Yugoslav Republic of Macedonia refer to the need to complement economic with social development as well as the respect for basic social rights. The 1999 EU-South Africa Trade, Development and Cooperation Agreement with South Africa and the 2005 EU-Algeria Association Agreement also refer to the need to respect fundamental social rights and provide for dialogue and cooperation in social matters.

cooperation and dialogue with a reluctance to use sanctions and a preference for civil society involvement.

The 2000 Cotonou Partnership Agreement (CPA)¹⁰⁹ occupies a particularly prominent position as it is the most comprehensive partnership agreement between developing countries. The CPA, which provides the framework for Economic Partnership Agreement (EPA) negotiations, reflects a policy shift in EU development policy from preferential market access to mutual free trade between the EU and African, Caribbean and Pacific (ACP) regions, in which development is the overriding goal. However, this shift to differentiated reciprocity is partially based on the EU's own commitment to make its trade agreements compatible with the WTO rules. So this change is guided, to a certain extent, by self-interest. Nevertheless, it is still noteworthy that both the EU and the ACP countries have equally committed themselves to respect CLS and to enhance cooperation in this area, for example, through the adoption and enforcement of legislation and, at the same time, rejecting the use of labour standards for protectionist purposes, as provided in Article 50, which is the key labour clause of the agreement. The latter is mainly promotional in nature, reaffirming standards that do not create binding obligations and which, according to Alston, may undermine ILO's supervision.¹¹⁰ Kenner maintains that Article 50 should not be viewed in isolation but within the broader context of the agreement's trade and development regime.¹¹¹ In particular, the labour clause 'entrenches the CLS within the partnership as recommended by the World Commission on the Social Dimension of Globalization (WCSDG).' In particular, it is based on the view that the objectives of the ILO can be best achieved with the cooperation of regional actors and through transposition into the CPA of those obligations stemming from the 1998 ILO's Declaration, which in turn are 'subject to the oversight of the parties and coordinated action under the EU-ILO strategic partnership.'¹¹² This is reflected in Article 8 which clearly states that priority is given to political dialogue in relation to the essential elements (Annex VII) to avoid scenarios in which a party might deem it justified to activate the non-execution clause provided in Article 96. The latter foresees the holding of consultations, excepted in the cases of 'special urgency', in circumstances where a Party considers that the other Party has failed to fulfill an obligation stemming

¹⁰⁹ The CPA was concluded for a 20-year period from 2000 to 2020 between the EU and 79 ACP countries. Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ L317, 15/12/2000, p. 3. It has been revised twice: in Luxembourg on 25 June 2005, (OJ [2005] L 209, 11/08/2005, p. 27) and in Ouagadougou on 22 June 2010 (OJ [2010] L 287, 04/11/2010, p. 3).

¹¹⁰ P. Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15(3) *European Journal of International Law* 511.

¹¹¹ J. Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?' in B. Van Vooren, S. Blockmans and J. Wouters (eds) *The EU'S role in global governance: the legal dimension* (Oxford: Oxford University Press 2013) p. 316.

¹¹² *idem*.

from the essential elements clause. It is only when these consultations between the parties fail that appropriate measures may be taken. In any event, these measures shall be revoked as soon as the reasons for taking them have disappeared.

Article 9 envisages several features which link development and human rights to labour standards and social policies.¹¹³ First, development is 'centred on the human person', who is seen as the protagonist and beneficiary for development, entailing 'respect for and promotion of all human rights.' Respect for human rights is regarded as integral to sustainable development.¹¹⁴ Second, the definition of human rights includes respect for fundamental social rights. In addition, the CPA provides for the use of dispute settlement in relation to the interpretation and application of their human rights clauses, including appropriate measures adopted under these clauses.¹¹⁵ However, what is problematic is that the essential elements clause in Article 9(2) has been invoked to initiate a consultation procedure mainly for coups d'état or flawed election processes with a reluctance to use it in relation to social and economic rights.¹¹⁶ Besides these more technical legal aspects of the agreement, the CPA seems to have had a negative impact on local communities as tariff liberalization has led to an increase in unemployment levels in certain key agriculture sectors and, in some instances, to their collapse such as in the case of poultry meat production.¹¹⁷ The CPA therefore, seems to be instrumental to the EU's need to have access to the markets of emerging economies rather than to the development needs of third countries.

In addition, with the exception of Article 50 of the CPA, social norms in EU agreements seem to have been included as objectives to be achieved under the umbrella term of "sustainable development" rather than enforceable legal commitments as they do not provide for genuine enforcement mechanisms. As Bartels points out 'it is notable that the principle of sustainable development has never been treated as a concrete obligation in itself: none of the agreements

¹¹³ See J. Kenner, *supra* note 111, at 315.

¹¹⁴ *idem*.

¹¹⁵ Cfr. with the EU-Central America Association Agreement, which provides that an affected party can request that an urgent meeting be called to bring the Parties together within fifteen days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties, see Article 355(5).

¹¹⁶ E.g. The coup d'état in Guinea Bissau in 2003, the coup d'état in Central African Republic in 2003 and flawed elections in Togo in 2003, for further analysis, see L. Mbangu, 'Recent Cases of Article 96 Consultations' European Centre for Development Policy Management (ECDPM), Discussion Paper No. 64C, August 2005.

¹¹⁷ A. Kwa, P. Lunenburg and W. Musonge, 'African, Caribbean and Pacific (ACP) countries' position on Economic Partnership Agreements (EPAs)' Study for the EU Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, Brussels, April 2014, EXPO/B/DEVE/2013/30; J. T. Gathii, 'The Cotonou Agreement and Economic and Partnership Agreements' in United Nations Human Rights, Office of the High Commissioner *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* / (New York, Geneva: United Nations 2013), 259-273.

admit the possibility of violating the principle of sustainable development.’¹¹⁸ This is because ‘the exact implications of sustainable development for trade agreements are far from clear due to the normative uncertainty surrounding the concept of sustainable development, which has played out differently in varied contexts and is still subject to evolution.’¹¹⁹ The agreements contain provisions on cooperation and obligations to respect and “strive” to improve multilateral and domestic labour and environmental standards.¹²⁰ In particular, a first set of obligations contain minimum obligations to implement certain multilateral obligations and other obligations which require the parties to the agreement not to reduce their levels of protection and encouraging them to raise their levels of protection, subject to a proviso that this is not done for protectionist purposes.¹²¹ With the turn in the 1990s to social trade at the regional and bilateral levels, sustainable development has become increasingly important in the EU’s trade policy¹²² and the Treaty of Lisbon has elevated it to one of the key principles underlying EU external action.¹²³

This overarching legal commitment has been given further effect with the adoption of so-called “new generation” of trade agreements containing a “trade and sustainable development” chapter, which includes provisions for the respect of labour and environmental standards. Examples of such agreements are the 2011 EU-Korea FTA,¹²⁴ the 2012 EU-Central America Agreement¹²⁵ and the 2012 EU-Colombia/Peru Agreement.¹²⁶ The 2013 EU-Singapore FTA (which is awaiting ratification) also contains such chapter.¹²⁷ The 2008 CARIFORUM-EU

¹¹⁸ L. Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’ 40 *Legal Issues of Economic Integration* 2013, 306.

¹¹⁹ G. M. Durán, ‘Innovations and Implications of the Trade and Sustainable Development Chapter in the EU-Korea Free Trade Agreement’ in J. Harrison (ed.) *The European Union and South Korea The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh: Edinburgh University Press 2013) p. 126.

¹²⁰ For further analysis, see L. Bartels, ‘Social issues: labour, environment and human rights’ in S. Lester and B. Mercurio (eds) *Bilateral and regional trade agreements* (CUP 2009) p. 342.

¹²¹ L. Bartels, *supra* note 118, at 307-309.

¹²² The first of the EU’s agreements to make reference to the principle of sustainable development was the 1993 EU-Hungary Europe Agreement, see L. Bartels, *supra* note 118, 306.

¹²³ Article 21(2)d and (3) TEU.

¹²⁴ Free Trade Agreement between the European Union and its Member States of the one part, and the Republic of Korea of the other part (EU-Korea FTA) *OJ* [2011] L127/6, 14 May 2011, p. 6. It entered into force in July 2011 and it is the EU’s first trade agreement with an Asian country. It is also the first completed agreement in a new generation of FTAs launched by the EU in 2007 as part of its strategy to create “deep and comprehensive” free trade agreements (DCFTA) with selective partners following the Doha round stand-still at the WTO. On this point see, F. Hoffmeister, ‘The European Union as an International Trade Negotiator’ in J. Koops and G. Macaj (eds) *The European Union as a Diplomatic Actor* (Palgrave Macmillan 2014), Ch. 9.

¹²⁵ Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (EU-CAAA) *OJ* [2012] L346/3, 15 December 2012, p. 3.

¹²⁶ Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part *OJ* [2012] L354/3, 21 December 2012, p. 3.

¹²⁷ It is the first bilateral agreement concluded by the EU with an Association of Southeast Asian Nations (ASEAN) country and it has provided the blueprint for future bilateral agreements with

agreement is worthy of mention as it is the first EPA concluded with a regional group.¹²⁸ Since the conclusion of this agreement, the inclusion of a specific chapter setting out cooperation and commitments in relation to sustainable development has become systematic. It includes a reference to the ILO Decent Work Agenda (DWA) and CLS and the clauses are worded in such a manner suggesting that there is also reference to labour rights rather than merely standards or principles. For example, Article 72 provides that investors are required to act in accordance with ILO CLS and Article 73 provides that promotion of foreign direct investment (FDI) does not take place by lowering domestic environmental, labour or occupational health and safety legislation and standards.¹²⁹ It also has a separate chapter on social aspects of trade.¹³⁰ Another innovative feature of this EPA is, firstly, the setting up of the Joint Council, which has ‘the power to take decisions in respect of all matters covered by the Agreement.’¹³¹ Secondly, the EPA provides for a consultation and monitoring process, under which each party may request consultations on the interpretation and application of the social clauses in the agreement, with an advisory role for the ILO.¹³² The agreement also envisages that in the event of continued disagreement a Committee of Experts may be convened.¹³³

In general terms, while there is some variation between the provisions contained in the different agreements, there seems to be some level of commonality as to the substantive standards and the institutional set-up envisaged. Indeed we can identify a common core of the new generation of trade agreements such as a reaffirmation by the parties of their general commitment to promote trade in a way that fosters sustainable development; a reaffirmation that countries have the freedom to define their own level of social and environmental protection, and that social and environmental standards should not be used for protectionist purposes; a commitment to “strive” towards high levels of social and

other ASEAN countries; Free Trade Agreement between the European Union and Singapore, 17 October 2014, Authentic text as of May 2015 available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>>. The Commission has submitted a request for an Opinion of the CJEU in relation to the competence of the EU and the Member States and ultimately concerning the legal status of the agreement as a mixed agreement, see Opinion 2/15 Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, OJ [2015] C 363/22, 3.11.2015.

¹²⁸ The regional group comprises 15 Caribbean countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago; Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part (OJ [2008] L289, 30/10/2008, p. 3).

¹²⁹ For commentary on the investment provisions of the 2008 CARIFORUM-EU EPA, see P. J. Cardwell and D. French, ‘The European Union as a Global Investment Partner: Law, Policy and Rhetoric in the Attainment of Development Assistance and Market Liberalisation?’ in C. Brown and K. Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press 2011), 201-222.

¹³⁰ 2008 CARIFORUM-EU EPA, Articles 191-196.

¹³¹ 2008 CARIFORUM-EU EPA, Article 229(1).

¹³² 2008 CARIFORUM-EU EPA, Article 195.

¹³³ *idem*.

environmental protection by: a) implementing the ILO Conventions and other multilateral instruments applicable to the parties and b) respecting, promoting and realizing in their laws and practice the CLS and associated ILO Conventions proclaimed in the ILO Declaration of Fundamental Principles and Rights at Work of 1998; a commitment to cooperate to develop trade schemes and trade practices favouring sustainable development; and a commitment not to lower or fail to apply social and environmental standards with a view to encouraging trade or attracting investment.

The 2011 EU-Korea FTA and the 2012 TA Columbia and Peru include a reference to decent work and four CLS; in addition to the latter agreements, the 2012 EU-CAAA refers to the need to implement fundamental ILO Conventions, contained in the 1998 ILO Declaration of Fundamental Principles and Rights at Work. These three agreements all exemplify the EU predilection for soft conditionality. In particular, the Trade and Sustainable Development Chapter (Chapter 13) of the 2011 EU-Korea FTA has served as a model for other FTA negotiations,¹³⁴ following the adoption of the *Global Europe Strategy*.¹³⁵ It exemplifies a new trend in the EU's regulatory approach to the integration of trade and environmental/labour issues at the bilateral level according to which 'trade-labour and trade-environmental linkages are no longer conceived as exception clauses that are permissive and conditional in nature, but are further elaborated through positive commitments, as well as cooperative measures.'¹³⁶ The 2014 EU-Canada Comprehensive Economic and Trade Agreement (CETA)¹³⁷ stands out for its detailed provisions on labour issues. This is to be expected given that it is the first comprehensive economic agreement with a highly industrialised developed country, which shares a similar set of values and principles as well similar political and legal traditions with EU Member States. In the 2014 EU-CETA there are separate chapters on Trade and Sustainable Development,¹³⁸ Trade and Labour¹³⁹ and also Trade and Environment.¹⁴⁰ The Chapter on Trade and Labour is far more detailed than the one of the 2011 EU-Korea FTA and the degree of legal obligation is phrased in stronger terms. The focus is on the effective enforcement of labour provisions as can be seen by the binding language used, such as "shall ensure".¹⁴¹ In particular, it is stated that the Parties 'shall ensure' that their labour laws embody the eight ILO CLS fundamental

¹³⁴ See G. M. Durán, *supra* note 119, 124-145.

¹³⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 4 October 2006 'Global Europe: Competing in the world' COM(2006) 567 final.

¹³⁶ See G. M. Durán, *supra* note 119, at 135.

¹³⁷ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States of the other part, Consolidate Text published 26 September 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

¹³⁸ 2014 EU-CETA, Chapter 22.

¹³⁹ 2014 EU-CETA, Chapter 23.

¹⁴⁰ 2014 EU-CETA, Chapter 24.

¹⁴¹ E.g. 2014 EU-CETA, Articles 23.3 and 23.5 para. 2.

Conventions.¹⁴² The 2014 EU-CETA also refers to specific labour law rights related to the ILO DWA, namely, health and safety at work and the prevention of occupational injuries; acceptable minimum employment standards for wage earners and non-discrimination of working conditions, including for migrant workers.¹⁴³ In addition, a party is not allowed to waive or derogate from its labour law and standards in order to promote trade or investment and through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards for the same reasons.¹⁴⁴ Each Party shall encourage public debate and promote public awareness of its labour standards and their enforcement.¹⁴⁵ The 2014 EU-CETA, therefore, contains a fairly robust labour-related chapter which combines promotional with more binding elements.

The 2016 EU-Vietnam FTA¹⁴⁶ is also noteworthy. The FTA makes an institutional and legally binding linkage to the 2012 EU-Vietnam Partnership and Cooperation Agreement (PCA).¹⁴⁷ Significantly, in the latter agreement the commitment of both parties to the respect for human rights through the human rights clause and the promotion of sustainable development have been included in one article, which seems to suggest that sustainable development has gained further prominence.¹⁴⁸ The FTA contains a Trade and Sustainable Development Chapter, which includes obligations for both the EU and Vietnam with regard to a core set of multilateral standards and agreements on labour and environment, ensuring the respect by both parties of fundamental workers' rights as well as furthering environmental governance.¹⁴⁹ With regard to labour provisions, there is reference to specific commitments on the effective implementation of each of the four ILO CLS and of all the ratified ILO Conventions (not only the fundamental ones), as well as progress towards ratification of non-ratified fundamental ILO

¹⁴² 2014 EU-CETA, Article 23.3, par. 1. This is particularly significant given that to date Canada has ratified six of the eight Fundamental Conventions (Conventions No. 29, No. 87, No. 100, No. 105, No. 111 and No. 182).

¹⁴³ 2014 EU-CETA, Article 23.3 para. 2.

¹⁴⁴ 2014 EU-CETA, Article 23.4, paras. 2 and 3.

¹⁴⁵ 2014 EU-CETA, Article 23.6, paras. 1 and 2.

¹⁴⁶ Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, Agreed Text as of January 2016, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>>; see also European Commission, 'Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement', Commission Staff Working Document, Brussels, 26.1.2016, SWD(2016) 21 final; for academic commentary see T. M. H. Hoang et al. 'Labour Provisions in Preferential Trade Agreements: Potential Opportunities or Challenges to Vietnam?' SECO Working Paper 2/14, World Trade Institute, University of Bern, 27 May 2014, available at <http://www.wti.org/media/filer_public/32/31/3231e444-9a9b-4fe2-a24f-38acc5aefa98/wti_seco_wp_02_2014.pdf>.

¹⁴⁷ E.g. Preamble, Articles X. 17 and 21 of the Chapter on Institutional, General and Final Provisions (CIGF), Ch. 17, 2016 EU-Vietnam FTA; Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part of 27 June 2012, available at <http://eur-lex.europa.eu/resource.html?uri=cellar:e9d99d61-6897-11e3-a7e4-01aa75ed71a1.0011.01/DOC_2&format=PDF>.

¹⁴⁸ 2012 EU-Vietnam PCA, Article 1(1) and (3).

¹⁴⁹ 2016 EU-Vietnam FTA, Ch. 15.

Conventions.¹⁵⁰ Overall, these new provisions clearly indicate a stronger domestic political commitment to labour reforms that will ensure a more developed domestic labour legal framework, improvement of the enforcement of domestic labour law system. It is noticeable however that a legally binding language is absent and the more nuanced terms of “recognize”, “reaffirm its commitment” or “will make continued and sustained efforts” are used as opposed to the stronger term of “shall ensure”.¹⁵¹

With regard to the institutional provisions, at government level, ministerial contact points, specialized committees and/or boards of senior officials for the purpose of implementing the trade and sustainable development chapter have been set up. Government officials meet annually with labour and environmental experts in the Committee on Trade and Sustainable Development, which has been established to oversee the implementation of the Trade and Sustainable Development chapter. As regards civil society and social partners, the 2011 EU-Korea agreement provides for Domestic Advisory Groups for each party made up of civil society, business, social partners and other experts from relevant stakeholder groups, which meet at an annual Civil Society Forum.¹⁵² Similarly, the 2012 EU-Colombia/Peru¹⁵³ and EU-CAAA¹⁵⁴ agreements mandate each party and the subcommittee/board to meet with existing national advisory groups (or to create new ones) and civil society on a regular basis.

The increased involvement and influence of the EU Parliament in the conclusion of trade treaties further to the changes introduced by the Treaty of Lisbon is pivotal to this development and for a number of years it has been calling for the practice and policy developed in the context of cooperation and association agreements containing chapters on human rights to be extended to “pure” trade agreements.¹⁵⁵

While these are significant features of the “new generation” of trade agreements, which contribute to injecting a social dimension into the EU’s external trade policy, it remains to be seen whether they entail an improvement of the implementation-capacity of developing countries to respect and protect labour standards and thus lead to an effective improvement of labour standards internationally. To date whether the EU soft conditionality works remains an open question. When countries adopt a clear resistant and/or obstructionist approach particularly towards full compliance with ILO Conventions, then this approach will be ineffective. The substantive norms that these new type of agreements introduce to achieve the sustainability objectives are ‘formulated in

¹⁵⁰ 2016 EU-Vietnam FTA Article 3, Ch. 15.

¹⁵¹ *idem*.

¹⁵² 2011 EU-Korea FTA, Article 13.12(3)-(5) and Article 13.13.

¹⁵³ 2012 EU-Colombia/Peru, Article 282.

¹⁵⁴ 2012 EU-CAAA, Part III.

¹⁵⁵ EP Resolution of 25 November 2010 on human rights, social and environmental standards in international trade agreements, P7_TA(2010)0434, § 12; EP Resolution of 27 September 2011 on a new trade policy for Europe under the EU 2020 strategy, P7_TA(2011)0412, § 6.

such manner that it often seems hard or even impossible to prove that a party is not meeting its obligations.’¹⁵⁶ Enforcement remains weak as any dispute concerning the trade and sustainable development chapters should be resolved solely through the specific dispute settlement procedure provided therein, as recourse to the general dispute settlement procedures available under the FTAs is explicitly excluded for matters falling under the chapter. In most cases there is a tendency to delegate disputes to a more neutral Panel of Experts. In some instances, there are no provisions in case of non-compliance and there is a lack of representativity of the social partners such as in the case of the EU-South Korea agreement where some trade unions and organized civil society representatives have been excluded from the Korean Domestic Advisory Group.

In addition, there is a risk of overlap between the implementation of the Trade and Sustainable Development Chapter provisions and the obligations that arise from the human rights clauses. ILO’s CLS are also human rights and the Commission itself considers that they are covered by the standard human rights clauses.¹⁵⁷ This is not a mere theoretical issue: whether a labour violation falls within the scope of the Trade and Sustainable Development Chapter or that of a human rights clause has significant implications in terms of enforceability.¹⁵⁸

In essence, there are two parallel co-existing systems: on the one hand, human rights and democratic principles with a strong monitoring and enforcement mechanism, which is seldom applied and, on the other hand, the Trade and Sustainable Development chapter with a weak monitoring and enforcement mechanism, which impedes any form of effective enforceability of the labour provisions. These different approaches of the EU are problematic because they undermine the EU’s obligation to respect the indivisibility of all human rights. Moreover, including labour provisions under the Trade and Sustainable Development Chapter weakens their human rights connotation.

Despite the limited enforceability of labour provisions in the “new generation” of trade agreements in the short term, their inclusion may have nevertheless important policy learning effects in the longer term such as providing the ground for transnational advocacy building and, linked to this, a better understanding of the challenges faced by a given third country, thus reducing negative externalities on affected stakeholders and communities.

¹⁵⁶ W. Douma, ‘The Promotion of Sustainable Development through EU Trade Instruments’ in L. Pantaleo and M. Andenas (eds), C. Reul (ass. Ed.) *The European Union as a Global Model for Trade and Investment*, University of Oslo Faculty of Law, Legal Studies Research Paper Series, No. 2016-02, p. 101; the analysis focuses specifically on the 2012 EU-Colombia/Peru Trade Agreement as an example of the new generation of EU trade agreements.

¹⁵⁷ L. Bartels, *supra* note 118, at 312.

¹⁵⁸ *idem*.

5. CONCLUSION: GLOBAL HUMAN DIGNITY THROUGH EU SOCIAL CONDITIONALITY

The interconnectedness between trade and labour in the context of new and more complex globalisation and transnational forces has not only become conspicuous but arguably also stronger. The emergence and further development of a global human rights regulatory “network” for institutionalising global regulation of human rights at work confirms this interdependence. This regulatory network utilises both hard and soft law approaches to governance. Soft law instruments, such as positive commitments, political dialogue and cooperative measures, can ensure a better impact of hard law instruments. Both the EU and the ILO have developed soft law strategies to its toolkit of instruments deployed in their joint efforts to achieve “decent work”.¹⁵⁹

In spite of these EU-ILO joint efforts problems concerning the enforceability (and thus credibility) of social conditionality in EU trade agreements remain. EU practice does not always reflect the objectives set out in EU discourse on social trade. In situating EU practice within the EU external relations’ normative context and mission post Lisbon,¹⁶⁰ it becomes clear that human rights clauses and the trade and sustainable development chapters are not mere EU foreign policy instruments but rather mechanisms that the EU should use to comply with its obligations under the EU Treaties.¹⁶¹ Indeed, Articles 3(5) and 21(1) TEU recognise economic and social rights as a matter of justice, which must be extended also to external trade relations. Moreover, Article 21(3) TEU refers to the external aspects of its other policies and thus extends the scope of application of the EU’s external human rights obligations. This provision is also normatively stronger than Article 21(1) TEU because it employs the terms “respect”.¹⁶² This argument finds further confirmation in *ATAA* where the CJEU held that Article 3(5) TEU establishes a positive duty for the EU to observe international law in its entirety.¹⁶³ However, the above provisions do not require the EU to pursue these objectives in any specific way and the EU is not formally bound by any multilateral or regional human rights treaty.¹⁶⁴ In addition, the EU

¹⁵⁹ E.g. the Better Work programme, which is a partnership between the ILO and the International Finance Corporation (IFC), more information is available at <www.betterwork.org>; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 24 May 2006 – Promoting decent work for all – the EU contribution to the implementation of the decent work agenda in the world [COM(2006) 249 final]; ILO, *The ILO and the EU, partners for decent work and social justice. Impact of Ten Years of Cooperation*, 5 December 2012, available at <http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf>.

¹⁶⁰ Articles 3(5), 21(3) TEU and 205 and 208(1) TFEU.

¹⁶¹ L. Bartels, *supra* note 118.

¹⁶² L. Bartels, *supra* note 39.

¹⁶³ Case C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, at paras. 101 and 123.

¹⁶⁴ The only exception being the 2008 UN Convention on the Rights of Persons with Disabilities (CRPD), which the EU ratified in 2010.

does not have a general competence in the field of human rights. This notwithstanding, Article 21(2)b and d TEU includes human rights, sustainable economic, social and environmental development of developing countries among the objectives of EU external action. Article 3(5) TEU refers to the Union upholding and promoting its values and, according to Article 2 TEU, the respect for human dignity and human rights features among the values of the EU.

With these important considerations in mind, what are the changes necessary for the EU to comply with these obligations? With regard to social conditionality in EU unilateral trade arrangements and, in particular the GSP+, the Commission should adopt a more comprehensive and cohesive approach in the way that it utilises the documents of ILO's supervisory bodies to ensure that it always intervenes in cases of blatant labour rights violations. In particular, this means that it should aim at reducing its selective conditionality by giving more weight to ILO reports and its supervisory bodies' findings and exercise more pressure on beneficiary countries in cases where there is strong evidence of labour rights abuses. With regard to the new generation of trade agreements, one solution could be the amendment of the provisions of the Trade and Sustainable Development Chapter so as to tailor them to the specificities of the third country that is party to the agreement. This could be along similar lines as those already proposed by Bartels in relation to the adoption of a new human rights clause.¹⁶⁵ Other proposals for improving the effectiveness of social conditionality in bilateral and regional agreements are: the development of time-bound labour-related objectives to trade agreements, greater involvement and consultation of social partners and civil society in the negotiations and implementation of labour provisions, to ensure better coherence in the way that ILO instruments are included in the various trade agreements,¹⁶⁶ and to improve current mechanisms for reviewing the impact of international agreements such as *ex ante* 'trade sustainability impact assessments' (hereafter "trade SIAs"), which the EU has been conducting prior to the conclusion of each trade agreement as part of the EU's sustainable development policy (focusing in particular on economic development, social development and environmental protection).¹⁶⁷ These *ex ante* trade SIAs should be increasingly informed by human rights considerations

¹⁶⁵ L. Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements' German Institute for Human Rights, Misereor, February 2014, available at <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf>.

¹⁶⁶ ILO, Report on *The Social Dimensions of Free Trade Agreements*, 6 November 2013, 6-7, available at <http://www.ilo.org/global/research/publications/WCMS_228965/lang--en/index.htm>, Chapter 4.

¹⁶⁷ European Commission, Handbook for Trade Sustainability Impact Assessment 2016, available at <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154464.PDF>; a list of completed and ongoing assessments is available at <<http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/assessments/>>; for further analysis, see K. Cote, 'European Union Trade Sustainability Impact Assessments: Developing Coherence between Trade Agreements and Labour Standards' in J. Wouters, G. Rayp, L. Beke, A. Marx (eds) Special Issue on 'Protecting Labour Rights in a Multi-polar Supply Chain and Mobile Global Economy' *Bulletin of Comparative Labour Relations* 2014:89, Ch. 6.

and combined with *ex post* evaluations to assess the human rights impact and review the implementation of trade agreements.¹⁶⁸ In this regard, the U.N. Special Rapporteur on the Right to Food has recommended that trade agreements be adopted provisionally with sunset clauses, namely a provision that it shall automatically cease to have effect after a specific date unless further action is taken to extend it, so as to allow for modifications in case their implementation is found by independent assessments to be generating human rights violations.¹⁶⁹

These proposals for improving social conditionality in EU trade agreements need to be taken a step further and evaluated also in light of the fact that the territorial reach of EU law is rapidly expanding. It is thus necessary to graft a “humaneness test” (here defined as “practical humanity”) onto external trade policies, which have development-related objectives. This would be in line with the EU’s global ethics of aspiration and it would require the EU not to undertake trade obligations, which would undermine its ability to fulfill its human rights obligations. Equally, it would require the EU not to conclude trade agreements, which if implemented, would undermine a third country’s capacity to fulfill its human rights duties. *Frente Polisario*¹⁷⁰ buttresses these claims. These extraterritorial duties are arguably necessary to give human rights meaning and, in particular, to ensure dignified standards of work and living conditions for the population of third countries that are parties to an international agreement concluded with the EU thus giving effect in this manner to the obligations arising from the EU Treaties.

¹⁶⁸ With the Treaty of Lisbon there has been growing emphasis on the need to develop tailor-made approaches to human rights-relevant policies, including trade policy, the use of impact assessments to ensure human rights consistency and, linked to the former, the importance of inserting human rights in impact assessments. Since 2012, and in line with Article 21 TEU, a new generation of EU trade SIAs has thus started to integrate, albeit partially, human rights considerations into their research methodologies; see EU Commission, High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, *Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach*, of December 12, 2011 (COM(2011)886); see also Council of the European Union, ‘EU Strategic Framework on Human Rights and Democracy’, Luxemburg 25 June 2012, 11855/12, 2; for further analysis, see S. Velluti ‘The promotion and integration of human rights in EU external trade relations’ *Utrecht Journal of International and European Law*, forthcoming.

¹⁶⁹ Human Rights Council, ‘Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Mission to the World Trade Organisation’, UN doc. A/HRC/10/5/Add.2 (25 June 2008) para. 37.

¹⁷⁰ See Case T-512/12, *supra* note 66.